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IN THE

Supreme Court of the United States

No. 79-288

PAUL E. VANCE,
Petitioner,

v.

EUGENE BARKSDALE, Sheriff of Shelby County, Tennessee, and the STATE OF TENNESSEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The petitioner, Paul Eugene Vance, seeks review by this Court of the order of the Court of Appeals for the Sixth Circuit which reversed the granting of his petition for habeas corpus relief by the district court. Prior to institution of this suit, petitioner was imprisoned by Eugene Barksdale, Sheriff, and the State of Tennessee in the Shelby County jail and in the State penitentiary, pursuant to his conviction of violating the gaming statutes of the State of Tennessee in Division III of the Shelby County Criminal Court on April 29, 1976. The United States District Court for the Western District of Tennessee, Western Division, the Honorable Harry W. Wellford, Judge, granted

petitioner a writ of habeas corpus, but its order was reversed by the decision of the Sixth Circuit entered on June 21, 1979. Petitioner is currently free upon bond pursuant to the stay of the mandate of the Sixth Circuit pending action upon his petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, the opinion of the United States District Court for the Western District of Tennessee, Western Division, and the report of the United States magistrate to the district court, on petitioner's petition for writ of habeas corpus, are unreported and appear in the petitioner's appendix at pages 16, 10, and 18, respectively.

The appendix submitted to this Court by the petitioner also includes at page 1 the opinion of the Tennessee Court of Criminal Appeals affirming the judgment of the trial court on petitioner's direct appeal of his conviction, together with the dissenting opinion in that court, reported as *Paul Eugene Vance* v. *State of Tennessee*, 557 S.W.2d 750 (Tenn. Crim. App. 1977).

JURISDICTION

The judgment of the court below was entered on June 21, 1979. The petition for a writ of certiorari was filed on August 21, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The petitioner essentially presents the following questions for review:

1. Whether the petitioner was properly convicted under federal constitutional standards upon his failure to prove an affirmative defense.

2. Whether the petitioner's conviction violates the first amendment guarantee of free exercise of religion or the establishment of religion clause.

3. Whether the issue of entitlement to the statutory exemption from the gaming laws was properly submitted to the jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The first amendment to the United States constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

2. The second sentence of the first section of the fourteenth amendment of the United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. A portion of Tennessee Code Annotated, section 39-2033(8), as it appeared at all times pertinent to this case:

> This chapter shall not apply to any bingo game, lottery, or similar game of chance conducted by charities, other religious or charitable groups, or any organization exempt from tax under paragraph (3) of subsection (c) of §501 of the Internal Revenue Code of 1954, as amended; or any labor organization exempted from tax under paragraph (5) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended; if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member or employee of such organization and if no part of the gross receipts derived

from such activity is used for any other than benevolent, charitable or religious purposes or for the purpose of constructing, maintaining or renting a building to be occupied by such organization. Provided, however, that all receipts, after deduction of necessary expenses and costs, acquired by labor organizations under this section shall be placed in a special account to be used exclusively for charitable purposes and an annual report of such fund shall be filed with the secretary of state not later than July first of each year showing all receipts and disbursements and specifically for what purpose the disbursements are made.

STATEMENT OF THE CASE

This case requires a determination of whether the petitioner was properly convicted of gaming offenses under Tennessee law in light of the claim that he was conducting such activities under the auspices of a religious organization exempt by the terms of the Tennessee gaming statutes. His basic contention is that his convictions violate his rights under the first amendment of the United States Constitution, as made applicable against the State by the fourteenth amendment.

a. **Proceedings Below.**

Paul Eugene Vance was indicted on April 29, 1976, by the Shelby County Grand Jury for violations of several sections of the Tennessee gaming statutes. He was tried by a jury before the Honorable William H. Williams, Judge, and convicted of violating Tenn. Code Ann. §§39-2032, 39-2036(4), and 39-2002. Under these respective convictions, he was sentenced to imprisonment in the state penitentiary for not less than two (2) nor more than three (3) years and a fine of $1,000.00, to confinement in the county jail or workhouse for six (6) months and a fine of $1,000.00, and to confinement in the county workhouse for six (6) months and a fine of $1,000.00, the sentences under these convictions to run concurrently. The petitioner appealed

these convictions to the Court of Criminal Appeals of Tennessee, which affirmed them in an opinion issued on June 30, 1977. The petitioner then filed a petition for writ of certiorari in the Tennessee Supreme Court, which denied the petition in a per curiam order entered on November 14, 1977. The Supreme Court of Tennessee denied a petition to rehear the matter in an order filed on January 9, 1978, and on January 10, 1978, the Court of Criminal Appeals of Tennessee denied petitioner's application for a stay of execution of his sentence pending a writ of certiorari to the United States Supreme Court.

The petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee, Western Division, On January 24, 1978. Following submission of the case to the magistrate and consideration of the issues presented by briefs and at an oral hearing, the Honorable Harry W. Wellford, Judge, issued an order on September 21, 1978, that a writ of habeas corpus would be granted ninety (90) days from that date and the petitioner would be released unless he was retried by the State of Tennessee before the expiration of that ninety (90) day period. The petitioner was allowed to make bail pending retrial. On October 31, 1978, the District Court entered an order staying its previous order so that the respondents might effectively pursue their rights on appeal.

On June 21, 1979, the United States Court of Appeals for the Sixth Circuit entered an order reversing the judgment of the district court and remanding the case with instructions that the district court dismiss the application for a writ of habeas corpus. On July 17, 1979, the Sixth Circuit upon motion of the petitioner entered an order staying the issuance of its mandate. On August 21, 1979, the petitioner's instant petition for a writ of certiorari was filed. Petitioner currently remains free under the terms of his original bond.

b. Statement Of the Evidence

The testimony introduced at trial established the following circumstances of the offense (page references are to the respondent's appendix filed in the Sixth Circuit, which will be abbreviated as "A"):

On December 26, 1975, five members of the vice squad of the Memphis Police Department went to 1957 South Third Street and, upon entering, saw six converted postage stamp machines which dispensed small tabs entitling the possessor to win from one to five dollars. Lieutenant R. V. Howell testified that the vice officers played these machines and approached Vance, the petitioner here, and asked it they would be paid off in cash if they obtained the right combination of numbers, to which Vance replied that they would be paid if they got the right combination of numbers or the correct combination of pictures of fruit or bells. (A. 5-6). Vance was then arrested. (A. 6). At the same time, the officers confiscated boxes of tabs that were dispensed by the machines, "rip-offs", and several punch boards. (A. 6). Five photographs of the scene at the time of Vance's arrest were admitted into evidence at trial as Exhibit 1, showing numerous punchboards and the postage stamp machines which had been converted into gambling devices. (A. 6-7).

Near the window where the person operating the business made change, there were handprinted signs on the wall saying, "If you have a loan past due and win a pile of $20 or over, the account will be paid at any balance given to you. Gene." Another sign said, "All loans are for a two-week period. Keep your credit good or you can't borrow any more. Gene." (A. 14). Lieutenant Howell identified the man that he arrested on December 26, 1975, as the same individual, Vance, seated in the courtroom on the day of the trial. (A. 16-17).

Sergeant Guy Meeks, a member of the Memphis Police Department vice squad, testified that he went with other members of the vice squad to 1957 South Third Street to investigate a complaint regarding gambling devices. (A. 19-20).

Sergeant Meeks testified that at the time of the arrest, he advised Vance of his rights. (A. 20-21). With reference to eighty-nine (89) boxes of refill tabs which were confiscated at the scene of the arrest, Sergeant Meeks had heard Vance state at the preliminary hearing in City Court that he made approximately $160.00 from each box of tabs. (A. 22). Vance had also stated that these tabs were called "rip-offs" because the customer ripped a piece of the tab off to see whether he had a winning combination or not, and because people who purchased them were ripped off, in that it was almost impossible to win. (A. 22-23). Sergeant J. R. Floyd, also a member of the Memphis Police Department vice squad, corroborated the testimony of the proceeding witness. (A. 27).

The defense called as a witness Thomas G. Marbry, an employee of the Shelby County Register's Office. (A. 44). Marbry identified Exhibit 9 as an original charter filed with the Shelby County Register's Office on April 5, 1973, relating to the Christian Church of Faith. (A. 44). The address stated on the charter for that organization was 3210 South Getwell Avenue, Memphis. (A. 46).

The petitioner Vance then testified on his own behalf. He stated that the church whose charter had been introduced was located at 3210 South Getwell when it was chartered, and that the church had purchased property at that address. (A. 48-49). While at that location, the church operated bingo games and sold "rip-off" tickets, but they did not then use the dispensing machines. (A. 49) Because the church did not make any money and could not pay the mortgage at the Getwell address, the mortgage holder foreclosed and the church began meeting in various homes until November 1974, when it moved to the address of 1957 South Third Street. (A. 49-50). Mr. Vance testified that the hours of the church recreation center were 12:00 to 4:00 and 7:00 to 11:00 every day, and that church services had been conducted there every Sunday since opening. (A. 50). He testified that the minister was Andrew L. Patton and that the

church had helped people find religion and had given money to young children and to support other worthy causes. (A. 50-53). He stated that church services were held every Sunday at the South Third Street address at 3:00 p.m. (A. 57).

Upon cross-examination, Vance testified that the same minister had been holding services there since the organization started, and that his name was Reverend Patton. (A. 58). He testified that he had hired Patton before the organization opened in November 1974. Patton had just moved, however, according to his testimony, and Vance did not know his address. (A. 58). He said that he had not known the address of Reverend Patton before his moving, nor did he know the phone number of the minister. (A. 58). Vance admitted the front door of the building at 1957 South Third Street carried the legend that absolutely no children were allowed and that one had to be eighteen or older to enter. (A. 67). He explained that that sign was intended for when they were playing bingo. (A. 67).

Alvin Warren, the next defense witness, testified that he was an employee of Vance and was charged with the responsibility of cleaning up the church. (A. 78-79). He stated that church services were held every Sunday at 11:00. (A. 81-82). The church had helped him in that Vance had given him $531.00 for payments on his house on which he was in arrears. (A. 79, 84).

A.C. Brooks testified that he had attended church services at the Center and had heard Reverend Patton preach once. (A. 88). He said that he went to the Third Street address often to play bingo and in playing the machines had won $5.00 out of one of them. (A. 91-92). He said that he had borrowed $10.00 probably on three different occasions from Mr. Vance and had paid it back. (A. 92).

As a rebuttal witness the State called Sergeant Meeks, who testified that contrary to the statement of Vance, there was no pulpit or open Bible near the front entrance of the building at

1957 South Third Street. (A. 95-96). He said that instead six pinball machines were located immediately to the left of the door. While he was in the building on December 26, 1975, Meeks said he did not see any indication that it was used as a religious building, as a church, or in any religious connotation. He said he saw no Bible, no literature, and no religious documents of any sort. (A. 97). On cross-examination, Officer Meeks said there was a cross on the window on the outside of the building, and that the name of the place was inscribed on the window as the Southgate Chapel and Recreation Center sponsored by the Christian Church of Faith. It referred to Sunday services and the alleged minister, Andrew L. Patton. (A. 98).

Upon this testimony, the jury convicted Vance of violating Tenn. Code Ann.§§39-2032, 39-2036(4), and 39-2002, and imposed both fines and prison terms against him.

REASONS FOR DENYING THE WRIT

Respondent insists that the Court of Appeals correctly reversed the judgment of the district court by holding that the petitioner, as defendant in the state prosecution, offered no evidence which required the submission to the jury of the issue of his entitlement to claim the exemption granted to certain religious organizations and other charities. The Court of Appeals correctly held that the rule of Tennessee law placing on Vance the burden of proving that he was operating under the auspices of a church in order to claim the exemption was permissible under the federal constitution. The court below further correctly found no first amendment problems in this case, since the Tennessee statute does not discriminate against any religion and since the State can and must determine what is protected religious activity. Finally, the appellate court correctly upheld the trial judge's ruling as a matter of law that the alleged church was not exempt under the statute, since the petitioner offered no evidence from which a jury could have found his "church" to meet the requirements of the statute. Thus no infringement of the petitioner's constitutional rights exist which would justify federal habeas corpus relief.

In rendering its decision, the Court of Appeals did not come into conflict with another court of appeals or applicable state law; nor did it decide a federal question which has yet to be settled by this Court, reach a conclusion conflicting with applicable decisions of this Court, or raise any issue meriting this Court's review on writ of certiorari. *See* Sup. Ct. Rule 19(1)(b). There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

A.

The Trial Court Correctly Placed On Petitioner the Burden Of Showing His Entitlement As An Agent Of a Religious and Charitable Organization To the Statutory Exemption From the Gaming Laws.

The respondents contend that under Tennessee law, the burden of establishing the religious-based exemption from the gaming laws is upon the accused. The petitioner has advanced the proposition that once the religious exemption is claimed, the State must disprove entitlement to it, but this position has been rejected by all of the State and federal courts which have considered this case.

1. Allocation of Burden of Proof Under Tennessee Law.

The offenses of which Vance was convicted are set out at Tenn. Code Ann. §§39-2032, 39-2036(4), and 39-2002, and include professional gambling, maintaining a gambling premise, and encouraging, promoting, or exhibiting a gambling table or device. The exemption for charitable and religious organizations is contained in a separate portion of the Code, Tenn. Code Ann. §39-2033(8). Because of the structure of this statutory scheme, Tennessee law clearly holds that the burden of establishing the exemption falls on the organization claiming it. This basic principle was set forth in *Villines* v. *State,* 96 Tenn. 141, 33 S.W. 922 (1896), as follows:

> The law in Tennessee is that where certain categories of activities...are exempted from criminal liability by an independent section of the acts defining the particular crime, it is up to the defendant to bring himself within the exemption.

See also Davidson v. *State,* 223 Tenn. 193, 443 S.W.2d 457 (1969); *Everhart* v. *State,* 194 Tenn. 272, 250 S.W.2d 368 (1951); *Renfro* v. *State,* 176 Tenn. 638, 144 S.W.2d 793 (1940);

McHenry v. *State,* 168 Tenn. 667, 80 S.W.2d 655 (1934); *State* v. *Brewer,* 163 Tenn. 215, 42 S.W.2d 344 (1931).

The petitioner's position is that the burden was upon the State to prove that a portion of his gross receipts was used for non-charitable purposes. The district court and Court of Appeals rejected this untenable argument and held it incumbent upon the petitioner to present adequate and persuasive proof that none of the gross receipts from the operation were used for other than religious or charitable purposes. In that regard, the Tennessee Court of Criminal Appeals held that although the record contained testimony regarding the organization's alleged charitable projects and weekly religious services, "no evidence was presented tending to show that no person benefitted individually or that all of the gross receipts were used for benevolent, charitable or religious purposes." *Vance* v. *State,* 557 S.W.2d 750, 751 (Tenn. Crim. App. 1977). Even though the "church's" coffers were enriched by money from the rip-off machines (according to some testimony), there was no indication that parts of gross receipts were or were not funnelled to others for something beside benevolent or charitable purposes. Thus at trial the petitioner failed to establish his entitlement to the exemption.

2. **Burden of Proof Under Federal Authorities.**

This allocation of burden comports with federal constitutional principles. The State was required to prove beyond a reasonable doubt every fact necessary to constitute the crime, in accordance with *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068 (1970). Tennessee's requirement that Vance show his entitlement to any relief under the exemption comports with the well-settled rule that the State is not required to negate statutory exemptions when such exceptions are not an integral part of the offense. So long as the offense may be completely described without reference to the exception, the exception is a matter of defense and must be proved by the accused. Due process re-

quires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense, but it does not require proof of the non-existence of all affirmative defenses. *Patterson* v. *New York,* 432 U.S. 197, 97 S.Ct. 2319, 2327 (1977).

The exception which Vance claims entitles him to relief is clearly negative in its nature and a matter of affirmative defense on his part. The exception is not incorporated within the clause defining the offenses and is not a material part of the elements of any of the offenses of which Vance was convicted. Vance was found guilty of gambling offenses found in entirely separate sections of the gaming statute. Each of these offenses is complete in itself without reference to the religious and charitable organizations exception. The necessary elements of the three offenses were fully proved at trial, without reference to the religious organizations exemption. The burden of establishing the exemption fell upon Vance, and he proved unable to bring himself within the statutory exemption. This allegation of burden was appropriate under both Tennessee and federal law, and comports with the requirements of due process. Thus this issue affords no grounds for granting a writ of certiorari to the petitioner.

B.

Petitioner's Conviction Does Not Violate the First Amendment Since the State May Determine What Organizations and Activities Are "Religious."

The central thesis of the petitioner's position is that it is beyond the power of the State to determine that his activities were not religious. He contends that once an organization terms itself "religious," the State may not examine that claim without violating the first amendment. The State submits that it can and frequently must determine what groups and activities are religious within the meaning of the first amendment, even

though it cannot subject them to a test of orthodoxy or good faith. Under the constitutionally-formulated understanding of religion, the petitioner's purported "church" fails to qualify, but is merely a sham to promote gambling by invoking the name of religion.

1. Power Of the State To Define "Religion."

The petitioner has relied upon cases holding that the first amendment prohibits preferred treatment for any type of religion and prevents the State from inquiring about the truth of religious doctrines, no matter how bizarre, or the sincerity with which they are espoused. *See United States* v. *Ballard,* 322 U.S. 78 (1944); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953). The State has no quarrel with these decisions. Obviously, however, the State must at some point have the power to say that a group, regardless of its purposes or beliefs, is not "religious" in the legal sense, even though it may claim to be. A group may not declare itself "religious" and thereafter be immune from all governmental scrutiny. Certainly the Catholics, Presbyterians, Quakers, and Jehovah's Witnesses are religious, as are Buddhists, Deists, Universalists, and the "I Am" Movement of Ballard considered in the decision cited by the petitioner. With equal certainty, the Communist Party, the Mafia, and the Civitan Club are not entitled to religious exemptions, even if they should claim them. The State has authority to draw the distinction between religious and irreligious activity, upon a nondiscriminatory and carefully-considered basis.

The authority of the State to determine which groups are religious has frequently been recognized by the courts. The reasons for such a determination are well-stated in *Founding Church of Scientology* v. *United States,* 409 F.2d 1146, 1160 (D.C. Cir.), *cert. denied,* 396 U.S. 963 (1969), as follows:

> The Government might have chosen to contest the claim that the Founding church was in fact a religion. Not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status. It might be possible to show that a self-proclaimed religion was merely a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions. Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business, our legal system sometimes requires it so that secular enterprises may not unjustly enjoy the immunities granted to the sacred. When tax exemptions are granted to churches, litigation concerning what is or is not a church will follow. When exemption from military service is granted to those who object on religious grounds, there is similar litigation. When otherwise prescribed substances are permitted to be used for purposes of worship, worship must be defined. The law has provided doctrines and definitions, unsatisfactory as they may be, to deal with such disputes.

A similar approach was adopted by the Court in *Theriault* v. *Carlson,* 495 F.2d 390, 394-395 (5th Cir. 1974), which assumed the duty of deciding whether the beliefs professed by the petitioners were sincerely held and, in their own scheme of things, religious. The court stated:

> While it is difficult for the courts to establish precise standards by which the bona fides of a religion may be judged, such difficulties have proved to be no hindrance to denials of first amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity.

Under this approach, numerous cases have struggled to define religion and to determine whether groups claiming legal benefits as religious organizations are justly entitled to them. *See,e.g.,Brown* v. *Dade Christian Schools, Inc.,* 556 F.2d 310 (5th Cir. 1977); *Theriault* v. *Silber,* 547 F.2d 1279 (5th Cir.

1977); *Founding Church of Scientology* v. *United States,* 409 F.2d 1146 (D.C. Cir. 1969); *Washington Ethical Society* v. *Dist. of Columbia,* 249 F.2d 127 (D.C. Cir. 1957); *Theriault* v. *Silber,* 453 F.Supp. 254, 260 (W.D. Tex. 1978); *United States* v. *Kuch,* 288 F.Supp. 439 (D.D.C. 1968); *Fellowship of Humanity* v. *County of Alameda,* 153 Cal. App.2d 673, 315 P.2d 394 (1957).

2. **Application to the Instant Case.**

These cases provide ample authority for the State courts of Tennessee to have determined whether the so-called Southside Chapel and Recreation Center of the Christian Church of Faith was indeed a religious organization, as asserted by the petitioner. Abundant evidence was introduced establishing that this organization was not religious but was instead a sham for the operation of a gambling casino. Thus the organization is not protected by the first amendment, and the petitioner may not invoke cries of religious freedom to justify his activities.

In any event, the exemption provided by the Tennessee law is not one directed at religious organizations. It focuses upon charitable and labor organizations as well, and the petitioner may not claim religious discrimination, since his organization could still be exempt as a merely charitable organization. Thus invocation of the first amendment has no place in this case.

Under these criteria, the petitioner did not bear his burden of showing that he was operating under the auspices of a religious or charitable institution and that all of his profits went for religious and charitable uses. The decisions of the Tennessee courts and the Court of Appeals were correct and do not call for review by writ of certiorari.

C.

The Trial Court Properly Determined the Issue of Entitlement To the Religious Exemption Under Federal Constitutional Standards.

The petitioner contends, as the district court held, that the issue of entitlement to an exemption was not properly put to the jury so as to allow Vance to have a determination by the jury upon his affirmative defense of statutory exemption as a religious activity. The State asserts that the action of the district judge was in accordance with the mandate of due process, since the petitioner presented no evidence from which entitlement to the exemption possibly could have been found.

In his charge the trial judge instructed the jury as follows:

> You are instructed as a matter of law that exhibits 2 through exhibit 7 are gambling devices which are prohibited by law and are not exempt under section 39-2033(8). They are not exempt as gambling games or devices such as bingo, lottery, or similar games of chance allowed to be conducted by charities, other religious or charitable groups.

The judge then instructed the jury by reading the Code sections containing the offenses charged and §39-2033, including the religious and charitable exemption provision.

The district judge thought that this procedure amounted to removing the question of exemption as a religious organization from the jury's consideration. Under the federal Constitution, however, the petitioner had no right to a jury determination of whether his activities qualified as religious ones. A state may determine, as the trial judge indicated here, that an organization was not charitable or religious as a matter of law. Such was particularly true in this instance, since the petitioner had not produced any evidence from which a jury possibly could have

found that all of the gambling proceeds went for charitable and religious uses as required by the statute. The determination of whether a group is religious is an extremely complex and delicate one, not at all suited to a jury. Where the activities of the group are undisputed, the characterization becomes one of constitutional law which a jury is not competent to make. Such determinations must be reviewable on appeal as matters of law, to prevent a prejudiced jury from removing from first amendment protection unpopular groups that are actually religious.

That the characterization of a group as religious or not is a question of law inappropriate for a jury decision is established by many cases dealing with first amendment freedoms. In *Founding Church of Scientology* v. *United States,* 490 F.2d 1146 (D.C. Cir.), *cert. denied,* 396 U.S. 963 (1969), a jury verdict finding false and misleading labeling on devices used in Scientology was reversed because of the religious nature of that movement. The Court found jury determination of what was religious to be of little weight. Since religious claims could not be termed "false labeling," the Court ordered that upon any new trial,

> it [would be] incumbent on the trial judge to rule in the first instance whether each item of alleged false labeling makes religious claims and hence cannot be submitted to the jury for the factual determinations of whether it is a label for the device in question and whether it is false.

409 F.2d at 1165 (Opinion on petition to rehear). The trial judge thus was ordered to decide whether each item contained a religious claim or a non-religious claim to which a religious appeal merely had been tacked on. *Id.* n. 3. Only then was the item to be submitted to the jury, completely removing from their province the determination of religiosity. This parallels the trial court's treatment of the instant case, since the judge ruled upon the religious claims of the petitioner rather than leaving them to the jury's determination.

Under these authorities, the trial judge here correctly instructed the jury that the petitioner had not borne the burden of showing his activities to be religious and therefore exempt under the gaming statutes. That determination was a matter of law for the judge, not a fact question for the jury. Moreover, due process with its broad parameters certainly does not dictate that this issue be submitted to the jury. All the elements necessary to the offenses were submitted to the jury, and the claim of religious exemption was a legal and constitutional matter properly determined by the judge. The Due Process Clause of the federal Constitution requires no more, and that clause is the Court's only concern upon this habeas corpus petition. *See* 28 U.S.C. §2241; *Fay* v. *Noia,* 372 U.S. 391, 83 S.Ct. 822 (1963).

In ruling upon this issue, the Sixth Circuit forthrightly held that the petitioner offered no evidence which would require the submission to the jury of the issue of his entitlement to the exemption granted religious and charitable organizations by Tennessee statutes. No evidence in the record indicated that the petitioner's organization met the stringent requirement of Tenn. Code Ann. §39-2033(8) with regard to the disbursement of its funds, and no jury could have found this petitioner to be within the exemption. Thus the instructions given by the trial judge were proper and did not deprive the petitioner of due process of law. The petitioner has stated no basis for the granting of a writ of certiorari.

CONCLUSION

For the reasons stated herein, the respondents submit that the Court of Appeals for the Sixth Circuit correctly reversed the district court's granting of a writ of habeas corpus in this case. The Court of Appeals did not decide a federal question of substance not heretofore determined by this Court, nor did it decide any such question in a way probably not in accord with applicable decisions of this Court. There are no special or important reasons for granting certiorari in this cause. Accordingly, the instant Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and exact copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded by U.S. Mail, postage prepaid, to Keith V. Moore, 1904 100 North Main Building, Memphis, Tennessee 38103, and Ham Patterson, Suite 806 Dermon Building, 46 North Third Street, Memphis, Tennessee 38103, this the 7th day of November, 1979.

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